Supreme Court of the United States

OCTOBER TERM, 1925

No. 307

ED. RAFFEL — *Plaintiff in Error*

vs.

THE UNITED STATES OF AMERICA — *Defendant in Error*

On Certificate from United States Circuit Court of Appeals for the Sixth Circuit

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BRIEF FOR PLAINTIFF IN ERROR

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STATEMENT

It is our purpose, in the argument of this case, to confine the brief closely to discussion of the single question certified for solution.

Understanding, however, that it is permissible practice to have the entire record of the case, as cer-

tified from the District Court to the Appellate Court, filed in this Court and in anticipation of causing it to be so filed, we wish to quote the entire colloquy between the District Judge and the accused, as follows (Tr. 93):

> "The Court: This case was tried last week was it not? The witness: Yes, sir.
> "The Court: And you were present when it was tried? The witness: Yes, sir.
> "The Court: And the same witnesses testified then to what is testified now?—the same thing substantially? The witness: Yes, sir.
> "The Court: Did you go on the stand and contradict anything they said? The witness: I did not.
> "The Court: Why didn't you? The witness: I didn't see enough evidence to convict me.
> "Defendants object to the questions of the court.
> "The Court: I am not commenting; I am just asking why he didn't.
> "Defendants except.
> "The Court: That is so? The witness: I didn't think there was enough evidence to do it."

We deem it pertinent also to the solution of the question involved to call attention to references by the District Attorney in his closing argument to the failure of accused to testify. His language is hereinafter quoted and will be found at page 107 of the Transcript.

ARGUMENT

I.

It was improper for the Court to refer to the failure of the defendant to testify on the former trial.

The statute violated is Sec. 1465 U. S. Comp. Stat. 1916, 20 Stat. 30, which provides as follows:

> "In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses and misdemeanors, in the United States courts, Territorial courts, and courts martial and courts of inquiry, in any state or territory, including the District of Columbia, the person that is charged shall at his own request but not otherwise be a competent witness. And his failure to make such request shall not create any presumption against him."

The leading case on this subject is *Wilson vs. United States*, 149 U. S. 62, 27 L. Ed. 650. The rule is well settled in Federal jurisprudence that it is reversible error for the prosecution to comment upon the failure of a defendant to take the witness stand.

We think it equally well settled that it is also reversible error to comment upon the failure of a defendant to take the witness stand on a former trial of the case. The statute gives him the privilege of not doing so and expressly provides that his failure to do so "shall not create any presumption against him." We can think of no good reason for confining this statutory protection to the case then being tried, but, on the contrary, it seems to us, that it should extend to all trials of the defendant for the same offense. It is the violation of this statutory protection by comment or reference to the failure of the defendant to testify that constitutes reversible error. This extends to all the trials of a defendant.

In 16 Corp. Jur., p. 901, the general rule on this subject is thus stated:

> "A statute forbidding such comment applies to a failure to testify at the preliminary trial upon an application for bail, at a hearing on habeas corpus, *or at a previous trial of the case*." (Italic ours.)

Upon this subject, in the case of *Parrott vs. Commonwealth*, 20 Ky. Law Rep. 761, 47 S. W. 452, the Kentucky Court of Appeals said:

> "The bill of exceptions shows that one of the attorneys for the prosecution stated in his argument to the jury that there had been an examining trial of appellant, and that on that trial, although he had a right so to do that appellant had not testified, and that the first statement made by appellant about the difficulty was on that trial, when he testified, and then argued to the jury that his story was a fabrication and should not be believed. To this statement of the attorney appellant excepted and asked the court to say to the jury that the statements were improper, which the court failed to do."

In holding this error the court said:

> "Again, by section 233, sub-section 1, Criminal Code, it is provided that the defendant in criminal prosecutions may testify, 'but his failure to do so shall not be commented upon, or be allowed to create any presumption against him or her.'
>
> "This, in our opinion applies equally to a failure to testify on the examining trial as before a jury trial, for if it did not an accused could not testify on an examining trial."

On this same subject the same court said, in the case of *Newman vs. Commonwealth* (Ky.), 88 S. W. 1080.

> "It was improper for the attorney to refer to the fact that the defendant did not testify as a witness upon the application for bail. The statute which allows the defendant to testify in his own behalf in a criminal case expressly provides that his failure to testify shall not be adverted to, and this clause of the statute applies no less to previous trials than to the one in progress."

To the same effect as the foregoing are the following cases: *Buckley vs. State*, 77 Miss. 540, 27 Sou. 628; *Eads vs. State*, 66 Tex. Cr., 548, 147 S. W. 592; *Welch vs. State*, 57 Tex. Cr., 111, 122 S. W. 880; *Smith vs. State*, 90 Miss. 111, 43 S. W. 465, 122 Ann. St. Rep. 313; *Smithson vs. State*, 127 Tenn. 357, 155 S. W. 133.

The attorney for the government was too cautious to refer to this matter at first—but after the trial judge himself referred to it, the attorney then spoke of it in his argument as set out in assignment of error No. 23. On this point he said (Tr., 107):

> "This last week, when Wills was on the stand, Raffel sat by and heard Wills tell you that he told him he owned both the Economy Drug Store and the Stag Hotel. You sat there and heard him testify to that before another jury and you did not deny it, and you try now to hide behind the advice of your lawyers and say that is the reason why you didn't testify.
>
> "Defendants object.
>
> "If that hadn't been the truth his lawyers gave him mighty bad advice. The truth is not going to hurt anybody. He sat there dumb and silent as the tomb, and heard Wills say last week he told him he owned both of them, and that it was because people were jealous of him that they were trying to get him into trouble."

The harmful effect of this argument by the attorney for the government is at once apparent and does not need to be demonstrated to the court.

This cross-examination by the trial judge and this reference by the district attorney to the failure of the defendant Raffel to testify on the former trial is prejudicial error, we respectfully submit, as it unduly emphasized to the jury that the failure of a defendant to take the stand was an admission of the truth of the evidence against him, whereas the statute expressly says that no such presumption shall exist against him.

II.

Taking up the second of our contentions on this point. These questions by the judge indicated his belief in the guilt of the defendant, and that he was testifying falsely.

In 16 C. J. 804, the rule in regard to this matter is thus stated:

> "A remark of the judge indicating that he has a low opinion of the credibility and veracity of accused or intimating that accused has perjured himself at any time is error."

We say confidently that but one construction can be put upon the conduct of the trial judge in the case at bar—that he believed, and conveyed that belief to the jury, that Raffel, was testifying falsely because he had failed to deny the same evidence against him on a former trial.

In the case of *Egan vs. United States* (C. A. D. C.) 287 Fed. 958, the rule is thus stated as to what should

be the attitude of the trial judge on the trial of a criminal case:

> "The trial judge should be so impartial, in the trial of a criminal case, that by no word or act of his may the jury be able to detect his personal convictions as to the guilt or innocence of the accused."

In the case of *Adler vs. United States* (C. C. A. 5), 182 Fed. 464, 472, it was held that a cross-examination by the trial judge was prejudicial error. In the opinion the court said:

> "The trial judge under the Federal system, is not only permitted, but it is his duty, to participate directly in the trial, and to facilitate its orderly progress and clear the path of petty obstructions. It is his duty to shorten unimportant preliminaries, and to discourage dilatory tactics of counsel. The purpose of the trial is to arrive at the truth, and without unnecessary waste of time. In performing his duties it may become necessary to shorten the examination of witnesses by counsel, and there is no reason why the judge should not propound questions to witnesses when it becomes essential to the development of the facts of the case. This is a matter within the discretion of the court, with which we would be reluctant to interfere. But the conduct of the judge, in the performance of all his duties should appear to be impartial. The impartiality of the judge—his avoidance of the appearance of becoming the advocate of either one side or the other of the pending controversy which is required by the conflict of the evidence to be finally submitted to the jury—is a fundamental and essential rule of especial importance in criminal cases. The importance and power of his office,

and the theory and rule requiring impartial conduct on his part, make his slightest action of great weight with the jury. While we are of the opinion that the judge is permitted to take part impartially in the examination or cross-examination of witnesses, we can readily see that, if he takes upon himself the burden of the cross-examination of defendant's witnesses, when the government is represented by competent attorneys, and conducts the examination in a manner hostile to the defendant and the witness, the impression would probably be produced upon the minds of the jury that the judge was of the fixed opinion that the defendant was guilty and should be convicted. This would not be fair to the defendant for he is entitled to the benefit of the presumption of innocence by both judge and jury until his guilt is proved. If the jury is inadvertently led to believe that the judge does not regard that presumption, they may also disregard it.

"A cross-examination that would be unobjectionable when conducted by the prosecuting attorney might unduly prejudice the defendant when it is conducted by the trial judge. Besides, the plaintiff's counsel is placed at a disadvantage, as they might hesitate to make objections and reservations to the judge's examination, because, if they make objections, unlike the effect of their objection to questions by opposing counsel, it will appera to the jury that there is direct conflict between them and the court. If it were the function of the judge in this country, as it is in some foreign tribunals, to perform the duties incumbent here on the district attorney, the impression produced on the minds of the jury against the defendant would not be so inevitable. Counsel are expected to maintain an attitude of deference and respect toward the judge, and this attitude is maintained without difficulty when the judge

> confines his activities to the usual judicial duties. And the judge can more easily treat counsel with the respect due an officer of the court in the performance of a duty, if he avoids the performance of the duties properly incumbent upon an attorney representing one side of the case."

Upon this ground also we respectfully submit that this cross-examination by the trial judge was prejudicial error.

III.

We will now discuss the third ground upon which we rely upon this point—that in any event the testimony elicited by the court upon this cross-examination is incompetent.

The effect of the court's cross-examination was to show that at a previous trial the defendant then testifying had failed to deny the same evidence which had been produced against him on the present trial, and that the silence of the defendant upon such former trial was a tacit admission of the truth of such evidence. We maintain that, the defendant being protected by the statute and under no obligation to testify at the former trial, his failure to do so was not competent evidence against him on the second trial.

The rule in regard to this matter is thus stated in 8 R. C. L. 192:

> "But the rule that statements made in the presence of an accused person charging him with crime present a presumption against him,

if not denied by him, does not apply to such statements made in the course of judicial proceedings."

In the case of *Parrott vs. State of Tennessee*, (Tenn.) 139 S. W. 1056, 35 L. R. A. (N. S.) 1073, the court permitted the defendant to be questioned as to his failure to deny evidence produced against him at a hearing before a United States Commissioner on the same charge, and charged the jury to consider such evidence. In holding this error the Tennessee Supreme Court said:

"The evidence was incompetent, and the charge was erroneous. The rule that statements made in the presence of an accused person charging him with crime create a presumption against him, if not denied by him, does not apply to such statements made in the course of judicial proceedings. *Bell vs. State*, 93 Ga. 557, 19 S. E. 244; *State vs. Mullins*, 101 Mo. 514, 517, 14 S. W. 625; *State vs. Hale*, 156 Mo. 102, 107, 56 S. W. 881; *Comstock vs. State*, 14 Neb. 205, 15 N. W. 355; *People vs. Willett*, 92 N. Y. 29; *Maloney vs. State*, 91 Ark. 485, 491, 134 Am. St. Rep. 83, 121 S. W. 728, 18 A. & E. Ann. Cas. 480; *Com. vs. Zorambo*, 205 Pa. 109, 54 Atl. 716, 13 Am. Crim. Rep. 392; *Broyles vs. State*, 47 Ind. 251; *State vs. Senn*, 32 S. C. 392, 11 S. E. 292; *State vs. Boyle*, 13 R.. I. 537. If the party in question be on trial he cannot thus be forced to give evidence against himself in violation of the Constitutional guaranty which protects him against incriminating himself contrary to his will * * * If in any former trial he was justified in refraining from speaking by the constitutional provision above referred to he rightly refrained and his conduct should not be used against him in any subse-

> quent trial. To grant its use would practically nullify the constitutional provision. Therefore, in no event is such evidence competent against him."

The following cases are to the same effect as the foregoing: *Leggett vs. Schwab*, 111 App. Div. 341, 97 N. Y. Supp. 805; *Kelley vs. People*, 55 N. Y. 565, 14 Am. Rep. 342; *Com. vs. Kenney*, 12 Met. 235, 46 Am. Dec. 672; *Horan vs. Brynes*, 72 N. H. 93, 62 L. R. A. 602, 101 Am. St. Rep. 670, 54 Atl. 945; *State vs. Gilbert*, 36 Vt. 145; *United States vs. Brown*, 4 Cranch, C. C. 508, Fed. Cas. No. 14,660; *State vs. Smith*, 30 La. Ann. 457.

THE FIFTH AMENDMENT AND THE STATUTE PROTECT DEFENDANT FROM UNFAVORABLE INFERENCES THAT MIGHT BE DRAWN FROM FAILURE TO TESTIFY ON A FORMER TRIAL.

The statute provides that,

> "In the trial of all indictments, etc. * * * the person that is charged shall, at his own request, but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him."

The plaintiff in error, Raffel, on his first trial on the charge of violating the National Prohibition Act did not request that he be allowed to testify. His failure to make such request was, on his second trial, occurring about a week later, adverted to and commented upon both by the District Judge and the District Attorney, pointedly and vehemently, and in such manner as to create a strong presumption against him.

The question for decision here is whether the protection afforded *by the Fifth Amendment* to the Constitution and the Statute, *supra*, is to be denied by placing the narrow and, as we think, unwarranted construction upon these provisions contended for by Government counsel to the effect that these safe guards are applicable only to the particular trial in which the defendant failed to offer himself as a witness. Neither the language nor the spirit of these provisions warrants such narrow construction or application. The Statute after giving the defendant the right to testify on the trial of *all* indictments provides that his failure to do so shall not create any presumption against him. Plainly it means that it shall not create any presumption against him in any and all trials of a pending indictment. But it is contended that the later waiver by the accused of his privilege not to testify makes it proper to show his earlier silence.

Certain cases are referred to in the note made part of the Certificate as tending to support this proposition. Among these cases is *Taylor vs. Comth.*, 17th Ky. L. R., 1214. In this case, decided February 6, 1896, which was not officially reported, the Court of Appeals of Kentucky, in construing a section of the Criminal Code similar to the statute in question here, said:

> "We think this proviison is restricted to the trial and tribunal in which the failure to testify occurs, and that when he (defendant) takes the stand as a witness he may be subjected to cross-examination touching his credibility as any other witness."

The same Court, however, in the later decision of *Parrot vs. Comth.*, decided Oct. 18, 1898, 20 Ky. L.

R., 761, took the opposite view saying, after referring to the Kentucky Criminal Code on the subject:

> "This, in our opinion, applies equally to a failure to testify on the examining trial as on a jury trial for if it did not an accused could not testify on an examining trial. So in either case the statements of prosecuting counsel is prejudicial error denounced by statute."

And, again, the Court of Appeals of Kentucky in *Newman vs. Comth.*, 28 Ky. L. R., 81, in considering the same question, held:

> "It was improper for the attorney to refer to the fact that the defendant did not testify as a witness on the application for bail. The statute which allows the defendant to testify in his own behalf in a criminal case expressly provides that his failure to testify shall not be adverted to, and this clause of the statute applies no less to previous trials than to the one in progress."

In the note appended to the Certificate in this case the Court of Appeals has cited a long list of cases having bearing upon the question under consideration. It will be noted that none of the cases cited tends to support the proposition that later waiver makes testimony of earlier silence, competent, except *Taylor vs. Comth.* (which, as shown, has been overruled by two later Kentucky cases), and *Saunders vs. State*, 52 Tex. C. R, 156. Nearly all of the other cases and authorities cited either expressly hold that the accused's failure to deny upon his first court opportunity is not an admission, or tend to support that view.

The case of *Caminetti vs. United States*, 242 U. S. 470, 61 L. Ed. 442, holds that where the accused takes the stand in his own behalf and voluntarily testifies for himself, he may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence, in which he participated and concerning which he is informed, without subjecting his silence to the inferences to be naturally drawn from it. This case simply holds that a defendant voluntarily testifying subjects himself to the unfavorable inferences that may be drawn from his failure on *that* trial to deny incriminating testimony against him.

Wilson vs. United States, U. S. Supreme Ct. Reports, 37 L. Ed. 650, this Court, Mr. Justice Fields delivering the opinion, held that a disregard of this statute, through comments by the district attorney on the failure of the defendant to testify, constitutes reversible error.

In *McKnight vs. U. S.*, 6 C. C. A., 115 Fed. 972, the Court, through Judge Day, delivering the opinion, considered and discussed at considerable length the purpose and scope of the act under consideration. There the Court says:

> "A perusal of the decisions of the Supreme Court shows that no constitutional right has been the subject of more jealous care than that which protects one accused of crime from being compelled to give testimony against himself."
>
> "The right to such protection existed at the common law and was carried into the constitution, that the citizen might be forever protected from inquisitorial proceedings compelling him to bear testimony against himself of acts which might subject him to punishment."

In that opinion the Court quoted from *Boyd vs. United States*, 116 U. S., 6th Sup. Ct., 524; 29 L. Ed., 746, as follows:

> "It may be, it is the obnoxious thing in its least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be legally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the court to be watchful of the constitutional right of the citizen, and against any stealthy encroachments thereon. Their motto should be, '*Obsta principiis*'."

If the narrow construction contended for by Government counsel should prevail, the right of a citizen supposed to be guaranteed by the Constitution to refrain from testifying when charged with crime "consists more in sound than in substance." It is true that a defendant in a criminal case who voluntarily takes the stand subjects himself to proper cross-examination and criticism just as any other witness. He obligates himself to answer all competent questions. His waiver, however, does not extend to consenting to answer incompetent questions.

The testimony elicited by the Court in the case at bar was incompetent. It is a rule of evidence in criminal cases that it is competent to prove that an accused was silent in the face of statements incriminating him if the statements were made at a time and place and under circumstances obligating the

accused to respond or deny. Failure to explain can be against one only when there is an obligation to explain. To found an adverse presumption upon such failure is to impose an obligation to explain,—the party is forced to testify. Now, the circumstances under which defendant in this case failed to deny were that he was on trial in Court, had a constitutional right to fail to deny, and without surrendering that constitutional right could not have denied what was said against him unless he interrupted the witness on the stand and entered his protest by disorderly conduct in the court house.

It is a matter of common knowledge that defendants arraigned before United States commissioners for examining trial very rarely testify themselves. Considering it more or less a formal proceeding, they content themselvse with requiring the government to produce sufficient evidence to make a prima facie showing and reserve their real defense for the trial upon the merits. If upon the trial after indictment the court or government counsel are permitted to allude to the fact that the defendant had a right to testify on the examining trial, and to show by the defendant that he failed to deny material and incriminating testimony produced against him on such examining trial, the constitution and statute are emasculated, the accused is virtually driven upon the stand in every examining and other trial because of the peril in subsequent trial of having inferences drawn against him from his silence.

We respectfully submit that the question certified should be answered in the affirmative.

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